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No. 493

IN THE

Supreme Court of the United States

October Term, 1955

CLACKAMAS COUNTY, OREGON,
Petitioner,

v.

DOUGLAS McKAY, Secretary of the Interior, and EZRA TAFT BENSON, Secretary of Agriculture,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In The

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October Term, 1955

No. .....

Clackamas County, Oregon,
Petitioner,

v.

Douglas McKay, Secretary of the Interior, and
Ezra Taft Benson, Secretary of Agriculture,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Clackamas County, a political subdivision of the State of Oregon, the above named petitioner, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The United States District Court for the District of Columbia did not write an opinion, but dismissed the complaint on motion of the respondents, defendants in that Court. The opinion of the United States Court of Appeals for the District of Columbia Circuit, dated July 28, 1955, (Appendix, pp. 19A-22A), has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the District Court was entered July 28, 1955 (Appendix, pp. 19A-22A).

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

The questions involved are:

(1) Whether Section 1(a) of the Act of June 24, 1954, (68 Stat. 270), providing for the transfer of administrative jurisdiction from the Department of the Interior to the Department of Agriculture over 472,000 acres of lands in Oregon formerly a part of the Oregon and California railroad grant lands, contravenes the Constitution.

(2) Whether Clackamas County and the other seventeen Oregon land grant counties wherein the lands are located acquired vested rights under the Acts of Congress of June 9, 1916 (39 Stat. 218) and August 28, 1937 (50 Stat. 874).

(3) Whether the Acts of June 9, 1916, and August 28, 1937, established a continuing trust for the benefit of the eighteen Orgon land grant counties which can not be changed without their consent.

(4) Whether the 1916 and 1937 Acts are compacts with the land grant counties of Oregon on which they relied in their economic development.

(5) Whether transfer of administrative jurisdiction from the Department of the Interior to the Department of Agriculture resulting in a reduction of income to the land grant counties constitutes a "taking" without just compensation or due process.

STATUTE INVOLVED

The pertinent portions of the Act of June 24, 1954 (68 Stat. 270) are as follows:

> "That (a) those unselected and unpatented odd-numbered sections within the indemnity limits of the Oregon & California Railroad land grant authorized by the act of July 25, 1866 (14 Stat. 239), as amended by the act of April 10, 1869 (16 Stat. 47), and for which payment was made by the United States to such railroad or its successors in interest under the act of June 9, 1916 (39 Stat. 218), pursuant to the decree in the case of United States v. Oregon & California R. R. Co., (8 F. (2d) 645), which were included within the boundaries of national forests by proclamations of the President of the United States issued under the dates of June 17, 1892, September 28, 1893, October 5, 1906, January 25, 1907, March 1, 1907, and March 2, 1907, are hereby declared to be revested Oregon & California Railroad grant lands; and said lands shall continue to be administered as national forest lands by the Secretary of Agriculture subject to all laws, rules, and regulations applicable to the national forests: Provided, That all revenues derived from such lands and placed in special deposit by agreement between the Secretary of Agriculture and the Secretary of the Interior shall be disposed of in accordance with the provisions of title II of the act approved August 28, 1937 (50 Stat. 874) as hereby amended, and said lands shall not hereafter be subject to the provisions of any other laws or parts of laws which otherwise prescribe the disposal or distribution of receipts from lands of the United States, except that none of the provisions of this act shall affect revenues heretofore distributed. No part of said lands or the resources thereof shall be subject to exchange under the provisions of this or any other law applicable to national-forest lands or otherwise."

STATEMENT OF FACTS

By four statutes enacted in 1866, 1868, 1869 and [illegible] Congress granted to the Oregon and California Railroad Company more than 3,500,000 acres of land in Western Oregon to aid in the construction of a railroad and telegraph line from Portland southward to the California border, and directed that the lands be sold to actual settlers only in tracts not larger than 160 acres to any one settler and for prices not exceeding $2.50 per acre (Acts of July 25, 1866, 14 Stat. 239; June 25, 1868, 15 Stat. 80; April 10, 1869, 16 Stat. 47; May 4, 1870, 16 Stat. 94; Par. 4 of Complaint, App. p. 3A, 4A)

The grant included each alternate odd numbered section of public land, non-mineral in character, for ten miles on each side of the railroad line not previously reserved, occupied by settlers, or disposed of otherwise, with the right on the part of the railroad company to select in lieu of occupied or disposed of sections other odd numbered sections not more than ten miles beyond the limits of the primary grant (Par. 4 of Complaint; App. p. 3A, 4A)

For over 30 years, the railroad company violated the terms of the grant by refusing to sell the granted lands to actual settlers at the price of $2.50 per acre, and by making sales in quantities larger than 160 acres and for prices greater than $2.50 per acre. These unlawful acts seriously retarded settlement and development of Oregon and withheld from occupancy a fertile area larger than the State of Connecticut (Par. 5 of Complaint; App. p. 4A)

The United States, after an actual settler in 1907 had begun a legal proceeding in the United States District Court for the District of Oregon to compel the sale to him of a tract of 160 acres at $2.50 per acre, brought a suit through the Attorney General demanding forfeiture of the lands to the United States.

The suit of the settler and that of the Government were consolidated for trial. The settler contended that "[illegible]ual settler clause" of the grant was an enforceable covenant, and the Government contended that it was a condition subsequent. The District Court held that the actual settler clause was a condition subsequent, and decreed forfeiture of title by the railroad company to the United States (186 Fed. 861). The litigation culminated in a decision by the Supreme Court that the actual settler clause was an enforceable covenant and there could be no forfeiture, but Congress might pass appropriate legislation (Oregon & Calif. R. R. Co. v. U. S., 238 U. S. 411, 59 L. Ed. 1360, 1391, 1397). This Court said in part:

> "• • • we think, therefore, that the railroad company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition of them whatever or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the railroads." (59 L. Ed. 1397).

By the Act of June 9, 1916 (39 Stat. 218), Congress revested title to the unsold grant lands in the United States, and placed administration thereof in the Secretary of the Interior. Classification of the lands into three classes was directed, (1) power sites; (2) timber lands, and (3) agricultural lands. Sale of the timber and the agricultural lands was directed. Recognizing the great damage that had been done to the State of Oregon and its land grant counties and the immense monetary loss caused by the unlawful acts of the railroad company, Congress provided that all money derived from the lands should be deposited in the Treasury in a special account, designated "Oregon and California land grant fund", and

that, in effect, 75 per cent thereof should go to the State and the land grant counties, and 25 per cent should be available for use by the Secretary of the Interior for administration purposes.

By the Act of August 28, 1937 (50 Stat. 874), Congress directed administration of the lands on a *permanent* sustained yield basis, only the ripe timber to be removed therefrom, and that distribution of 75 per cent of the proceeds of such sales should be made annually to the eighteen Oregon land grant counties, of which petitioner is one.

After the original grants were made to the railroad company, the President, pursuant to authority granted by the Act of March 3, 1891 (26 Stat. 1096), by proclamations issued in 1892 and 1893, established the Bull Run and Cascade Range forest reserves and included within the exterior boundaries thereof 472,000 acres of the lands in the indemnity strip of the grant to the Oregon & California Railroad Company. These lands were said to be "controverted", because there was a dispute between the Department of the Interior and the Forest Service of the Department of Agriculture as to which Department should administer the lands. In 1942 an agreement was made by the two departments, providing that the Forest Service of the Department of Agriculture should "make sales of timber" from the lands, the money realized therefrom "to be put in escrow for distribution when the controversy has been resolved." Since the controversy had not been resolved, Clackamas County, petitioner herein, brought a suit in the United States District Court for the District of Columbia on November 20, 1952, to compel distribution among the eighteen Oregon land grant counties of the funds in the escrow account, amounting to more than $6,000,000.00, on the ground that the lands were Oregon & California railroad grant lands, subject to the administration of the Department of the Interior under the 1916

and 1937 acts mentioned above. In its decision, dated April 30, 1954, the United States Court of Appeals for the District of Columbia Circuit declared the lands to be Oregon & California grant lands and directed distribution of the escrowed funds to the eighteen Oregon counties in accordance with the applicable statutes, and that the Secretary of Agriculture be restrained from interfering with administration of the lands by the Secretary of the Interior. Congress then, on June 24, 1954, enacted the act in question, Section 1(a) of which constitutes the statutory provision assailed as unconstitutional in this proceeding.

Following enactment of the Act of June 24, 1954, the respondents herein, who were defendants in the suit above mentioned, filed a petition for writ of certiorari, and the Supreme Court, on April 18, 1955, granted that petition, held that the action was moot by reason of the statute, and remanded the case to the lower court with directions to dismiss the action on that ground (No. 604, October Term, 1954).

The complaint in this case, which was not denied but admitted by the motion to dismiss, further alleges that:

> "• • • Furthermore, the Forest Service of the Department of Agriculture pursues the policy of selling timber in large tracts, as to which the smaller, independent local mill-operators are powerless to compete with the large operators who dominate the lumber industry in the northwest, whereas the policy of the Bureau of Land Management of the Department of the Interior is to sell in smaller tracts in which the independent local mills can participate, thus stabilizing the local lumber industry, greatly to the benefit of said counties." (Par. 9 of Comp., App. p. 9A)

The prices realized by the Department of the Interior in its sales exceed considerably those resulting from sales in large quantities through the Department of Agriculture. The income of the land grant counties is impaired

and reduced by the transfer of administrative jurisdiction over the lands from the Department of the Interior to the Department of Agriculture.

Following enactment of the Act of June 9, 1916, the United States brought a suit in the United States District Court for the District of Oregon to determine the status and area of the Oregon and California grant lands remaining undisposed of, which resulted in a final judgment in 1925, providing, as to the 472,000 acres involved in this proceeding, as follows:

> "These lands lie within the indemnity limits of the grant, and were included within the limits of the national forest reserves by the proclamation of the President. * * * The lands, by reason of the deficiency, * * * had previously and necessarily become appropriated to meet the losses sustained to the place grant. They were not at that time a part of the public domain, and were unsusceptible of appropriation by the Government." (U. S. v. O. & C. R.R. Co., 8 F. 2d 645).

As to the status of the lands, the Act of June 24, 1954, did nothing more than to declare, as the Court had done 29 years earlier in the case just cited, that they were Oregon & California revested grant lands, subject to administration accordingly, but the Act went further and directed that the lands should henceforth be administered by the Department of Agriculture instead of the Department of the Interior. This is the transfer assailed in this action as being unconstitutional, because it deprives the Oregon land grant counties of property rights without just compensation or due process.

REASONS FOR GRANTING THE WRIT

As shown by the foregoing statement of facts, the Departments of the Interior and Agriculture pursue two different courses with respect to the disposal of timber

from the lands involved. Since the Act of 1937 provides for administration of the lands on a permanent sustained yield basis, the eighteen Oregon land grant counties rely and for years have relied on the income from the sale of ripe timber for the payment of their public expenses and development of their school systems, extension of roads, construction of new buildings, and the like, and for a quarter of a century or more have built their economic structures accordingly. While the lands were held by the railroad company they were subject to the usual real estate taxes levied by the political subdivisions of the State. Following revestment they ceased to become subject to such taxes. By its violation of the terms of the grant, the railroad company wrought great economic damage and loss to the land grant counties and the State. Incident to enactment of the 1916 Act, investigations were made by the Executive Departments of the Government, particularly the Department of Justice. S. W. Williams, one of its attorneys was sent to Oregon to investigate and report upon the question of revesting title to the lands. In his comprehensive report, among other things, he urged:

> "The greater part of the proceeds after making payments as above should be divided between the State and the several counties in which the lands are situated, to be used for public purposes, such as schools, construction of roads (of which most of the counties involved are badly in need). I would suggest that 35 per cent be given to the State and 40 per cent to the respective counties."
>
> (Vol. 53, Part 9, Cong. Rec., 64 Cong., 1st Sess., pp. 8939-42)

During the debates in Congress, Representative Nicholas J. Sinnott declared, with respect to the proposed payment of 75 per cent of the revenues from the lands to the State and the counties:

"This is indeed a most scant and deficient justification of Oregon's righteous claim.

• • • •

"A fertile area larger than the State of Connecticut withheld from settlement for a period of 50 years! Who can estimate the loss to my State? What monetary consideration can recompense us for the great mischief and damage? • • • And I say that the injury to my State by the loss of homes, of schools, and development is an injury that is incalculable. • • • The loss and injury to Oregon is irreparable. • • •

"My State has borne the entire loss and burden of the violated grant, the adverse conditions thereby entailed. Our industrial loss easily amounts to more than the entire value of the granted lands."

(Vol. 53, Part 9, Cong. Rec., 64 Cong., 1st Sess., pp. 8584-5)

Senator Clinton Anderson of New Mexico, formerly Secretary of Agriculture, at the hearing May 4, 1954, on S. 2225, which became the Act herein contested, said of the lands in question:

"What little study I had a chance to give it in the Department of Agriculture certainly indicated that the land now belonged without question to Oregon as far as benefits from it go and should be used for the benefit of the people of Oregon.

• • • •

I think that it belongs to Oregon and the benefits should go to Oregon."

(Hrgs. on S. 2225, May 4, 1954, before Senate Committee on Interior and Insular Affairs, pp. 12, 13).

Honorable Leslie M. Scott also stated that

"It would appear that the land was originally set aside as a gift to the people of Oregon in their struggling statehood."

(Hrs., May 4, 1954, supra, p. 12).

From the foregoing, it is clear that the land grant counties of Oregon acquired vested rights in the lands to the extent that they properly could and did rely on the continuance thereof unimpaired as a source from which to defray their public expenses and accomplish their economic development.

A vested right has been defined as

> "An immediate fixed right of present or future enjoyment, or an immediate right of present enjoyment, or present fixed right of future enjoyment."
>
> Pollard v. Megan Bros. Drug Co., (CCA) 233 Fed. 867.
>
> Steinfield v. Nielson, 15 Ariz. 424, 139 P. 879, 896.
>
> City of Chicago v. Collin, 302 Ill. 270, 13 NE 751, 752.
>
> Pearsall v. Great N. R. Co., 161 U. S. 1646, 16 S. Ct. 705, 40 L. Ed. 838.

The rights of the land grant counties were "fixed" by the Acts of June 9, 1916, and August 28, 1937, not only for present but for future enjoyment, since the 1937 Act provides for administration of the lands on a sustained yield basis as a source of permanent income to the counties. Accordingly, by impairing those rights and reducing the income of the counties, the Act of June 24, 1954, violates the Constitution.

> Lynch v. U. S., 252 U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1434.
>
> Treigle v. Acme Homestead Assoc., 297 U. S. 189, 56 S. Ct. 408, 80 L. Ed. 575.

Prior to establishment of the Oregon Country as a territory of the United States in 1848, a defacto republic in the nature of an independent sovereignty existed, with its own central government, organized and conducted as a republican form of government, which owned all public lands therein. On admission as a State, Oregon surren-

dered control over the primary disposition of public lands within its border, but did not part with its ultimate sovereign rights therein (Act of Feb. 14, 1859, 11 Stat. 283; Par. 3 of Comp., App. p. 3A)

By granting the lands to the railroad company, the Government made primary disposition thereof. The land grant counties of Oregon, as a consequence of the grant, acquired the right of taxation, the right to acquire title in the event of failure to pay taxes, the right of eminent domain, the sovereign right of escheat, and other sovereign rights, which, we contend, were not defeated by the revesting of title to the lands in the United States under the Act of June 9, 1916. The sovereign rights of the counties and the State remained. The Government took title subject thereto.

The Acts of June 9, 1916, and August 28, 1937, constitute a compact or agreement between the United States Government and the eighteen land grant counties of Oregon that the so-called revested-railroad grant lands shall remain permanently as a continued source of revenue to said land grant counties for their benefit and the benefit of the State as a whole. The counties, relying upon the terms of the two acts of Congress mentioned, have developed their industries, schools and civic enterprises accordingly, and have constructed roads, bridges, and highways leading to the lands to aid in the removal of timber therefrom; have maintained at great expense the roads over which the timber is transported to market, and have planned and carried out their economic life in reliance upon the continuance without reduction of income from the lands, which, since revestment of title in the Government in 1916, have not been subject to taxation. The eighteen land grant counties have a vested right in the lands and the income drived therefrom in perpetuity, which right is not subject to withdrawal, diminution or reduction without just compensation therefor. (Par. 7 of Comp., App. p. 7A)

The Act of June 24, 1954, by Section 1(a) in effect transfers to the Department of Agriculture administrative jurisdiction over the 472,000 acres in question vested by the Act of June 9, 1916, and continued by the Act of August 28, 1937, in the Department of the Interior, which is inconsistent with and contrary to the compact or agreement with the land grant counties on which they have relied as aforesaid, and is an unconstitutional taking and deprivation of petitioner's property and property rights without just compensation or due process. (Pars. 10 and 11 of Comp., App. p. 9A, 10A)

The complaint alleges and no one has denied that the transfer of administrative jurisdiction over the lands to the Department of Agriculture is but the beginning of a scheme or plan to transfer to the Forest Service administrative jurisdiction over the remaining 2,500,000 acres of Oregon and California revested grant lands in Oregon, for the benefit of a powerful lumber organization active in politics in Oregon and in the National capital, which enjoys a preferred position in obtaining timber through the Forest Service. (Par. 13 of Comp., App. 11A)

The Constitution provides in effect that no one shall be deprived of property without due process of law nor shall private property be taken for public use without just compensation (5th Amendment).

Since "due process" conemplates the right to be heard in a legal proceeding enforced by public authority, under the protection of the general rules which govern society, an act of Congress affecting property rights adversely is subject to the limitation of the Fifth Amendment.

Dartmouth College v. Woodward, 17 U. S. 518, 4 Wheat. 518, 4 L. Ed. 629.

Truax v. Corrigan, 257 U. S. 318, 42 S. Ct. 124, 66 L. Ed. 254.

> "This article is a restraint on the legislative as well as the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will."
>
> Murray v. Hoboken Land and Improvement Co., 18 How. 272, 59 U. S. 272, 15 L. Ed. 372.

The allegations of the complaint, which must be taken as true, establish the fact that by the transfer of administrative jurisdiction over the 472,000 acres of Oregon and California grant lands involved, the rights of Clackamas County and the other land grant counties are impaired, their incomes are reduced, and their property rights have been injured without due process of law or just compensation therefor. The provisions of the Act of June 24, 1954, in question, therefore, are repugnant to the Constitution. Unless the respondents, the two Secretaries, are able to show by competent evidence that the transfer of administrative jurisdiction over the lands in question does not impair or adversely affect the property rights of Clackamas County, the provisions of the Act in question clearly are unconstitutional. Petitioner is entitled to an opportunity to show at a hearing by competent evidence that the jurisdictional transfer provided for by the Act impairs and injures its vested rights. To deprive it of the right to a hearing is a denial of due process.

By the Acts of June 9, 1916, and August 28, 1937, revesting title to the grant lands in the United States and directing the permanent administration thereof on a sustained yield basis by the Department of the Interior for the benefit of the land grant counties, Congress established a trust, wherein the counties are beneficiaries, the Department of the Interior is the trustee, and the United States is the donor. The statutes make no reservation of power in the donor to withdraw, alter, or revoke the trust. Under that trust, petitioner contends that it and the other seventeen counties have continuing rights to

the receipt of 75 per cent of the revenues derived from the lands, and that no right exists in the donor to so change the trustee or the terms of the trust as to diminish, destroy or otherwise injure their rights. As shown above herein, the transfer of administrative jurisdiction over the lands from the Department of the Interior to the Department of Agriculture operates to reduce materially the income of petitioner and the other seventeen land grant counties. Such transfer, therefore, is contrary to the Constitution.

In paragraph 13 of the Complaint (App. p. 11A) allegations are made to the effect that transfer of jurisdiction over the lands in question to the Department of Agriculture opens the door to transfer to that Department of jurisdiction over the remaining 2,500,000 acres of grant lands in Oregon, which are mostly timbered, hazarding the sovereign rights of petitioner and the other counties, greatly benefitting a powerful lumber monopoly, which is active in politics and lobbying with a view to such transfer, as a result of which it would obtain preferred treatment in obtaining timber.

The situation has been aptly described by the Supreme Court in the following language:

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"
>
> Boyd v. U. S., 116 U. S. 616, 635, 6 Sup. Ct. 535, 29 L. Ed. 746, 752)

That language was quoted and the principle approved in Monongahela Navigation Co. v. U. S., 114 U. S. 312, 13 S. Ct. 622, 37 L. Ed. 463.

If transfer of the grant lands ultimately should be made to the Forest Service, the next "silent approach" and "stealthy encroachment" no doubt would be an attempted reduction in the ratio of distribution of the revenues to correspond with the general law relative to forest service lands, which return only 25 per cent to the counties, as compared to 75 per cent from Oregon and California revested grant lands. In fact the sponsor of the bill which became the Act of June 24, 1954, himself proposed a reduction to 50 per cent of the revenues to the counties derived from revested grant lands in Oregon. (See Portland Oregonian issue of Nov. 14, 1951, quoting Senator Cordon).

CONCLUSION

Clackamas County respectfully contends that the transfer of jurisdiction effected by the Act of June 24, 1954, over the lands in question operates to deprive it of a substantial income, and constitutes the taking of its property rights without due process of law or just compensation.

The writ should be granted with a view to reversal of the judgment below.

Respectfully submitted,

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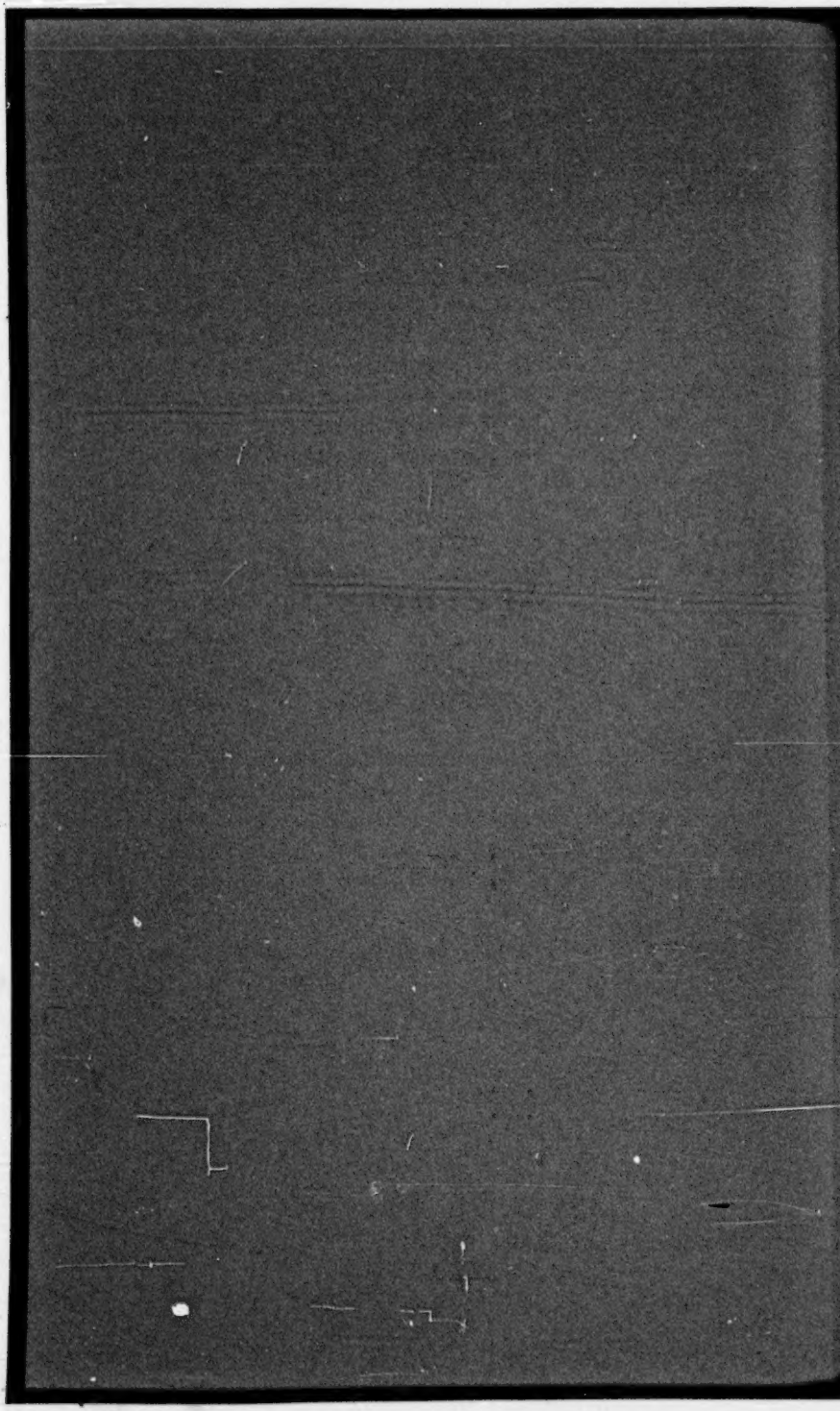
APPENDIX



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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1955

No. 12,533

CLACKAMAS COUNTY, OREGON,
Appellant,

v.

DOUGLAS MCKAY, Secretary of the Interior,
EZRA TAFT BENSON, *Secretary of Agriculture,*
Appellees.

Appeal from the United States District Court for the District of Columbia

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JOINT APPENDIX

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1 IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

Filed Sept. 16, 1954
CLACKAMAS COUNTY, OREGON,
Oregon City, Oregon,
Plaintiff,

v.

DOUGLAS McKAY,
Secretary of the Interior,
EZRA TAFT BENSON,
Secretary of Agriculture,
Defendants.

Civil Action No. 3939—54

Complaint for Injunction, Etc.

1 (a) Jurisdiction is founded on diversity of citizenship, the existence of a Federal question arising under the Constitution and particular Federal Statutes, and the amount in controversy.

(b) Plaintiff is a duly established political subdivision of the State of Oregon, having its county seat at Oregon City in said State.

(c) The defendant, Douglas McKay, as shown by the caption hereof, is Secretary of the Interior of the United States, is a legal resident of the State of Oregon, but at present and for more than six months has been residing in the District of Columbia.

(d) Defendant, Ezra Taft Benson, as shown by the caption hereof, is Secretary of Agriculture of the United States, and a non-resident of the State of Oregon and the District of Columbia, although at present is residing in the District of Columbia.

(e) This action involves the constitutionality of subsection (a) of Section 1 of the Act of June 24, 1954 (Public Law 426, 83d Congress, 68 Stat. 270), purporting by devious language to actually transfer 472,000 acres of Oregon & California railroad grant lands in Oregon, from Interior Department, where said lands are legally trusteed for the benefit of Oregon and 18 Oregon Counties, to the Agricultural Department, in derogation of Oregon's sovereign and vested rights and as an imminent hazard to Oregon's future income from said lands.

(f) The amount in controversy, exclusive of interest and costs, exceeds Three Thousand Dollars.

2. Plaintiff brings this action as one of eighteen so-called "O & C land grant counties" of the State of Oregon, for its own benefit and for the benefit of all other Oregon counties similarly situated. Plaintiff and the other seventeen land grant counties are entitled to receive 75 per cent of the gross revenues derived from certain "O & C railroad grant lands" located in said State, as hereinafter more fully shown.

3. Prior to the establishment of the Oregon Country as a Territory of the United States in 1848, that country was a defacto republic or independent sovereignty, having its own central local government, organized and conducted on principles and along the lines of a republican form of government, and was the owner of all lands from the California border on the south to parallel 54.40 on the north, and from the Rocky Mountains on the east to the Pacific Ocean on the west. On its admission into the Union as a State pursuant to the Act of February 14, 1859 (11 Stat. 383), Oregon surrendered control over the primary disposition of public lands within its borders, but did not part with its ultimate sovereign rights therein.

4. By the Acts of July 25, 1866 (14 Stat. 239); June

25, 1868 (15 Stat. 80); April 10, 1869 (16 Stat. 47); and May 4, 1870 (16 Stat. 94), Congress, pursuant to the Government's policy in developing and settling Oregon, granted some 3,700,000 acres of land in Oregon (but through the Oregon Legislature's designation) to the Oregon and California Railroad Company, and, at Oregon's instance, annexed to such grant an enforceable covenant running with the land providing that the railroad company should sell the lands to actual settlers only in tracts not greater than 160 acres to any one settler and for prices not exceeding $2.50 per acre. The grant comprised "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line, and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of" the railroad company should have the right to select "in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first named alternate sections."

5. For nearly fifty years, the railroad company violated the terms of the said grant by refusing to sell the lands to actual settlers at $2.50 per acre and in tracts not exceeding 160 acres. The unlawful acts of the railroad company kept from settlement an area larger than the State of Connecticut in parts of the most fertile portion of Oregon, and retarded that State's growth and development immeasurably. For such violations of the grant the Government, following the bringing of a suit by an actual settler in 1907 to compel the sale of a tract of said granted land to him, brought suit against the railroad company, seeking forfeiture of the unsold grant lands to the Government. The test suit of the settler and the

Government suit were consolidated and proceeded together for 8 years to the U. S. Supreme Court. The United States District Court for the District of Oregon decreed a forfeiture (186 Fed. 861). The Supreme Court of the United States, in 1915 (238 U. S. 411) reversed the
4 forfeiture decree, but declared that Congress might pass appropriate further legislation in harmony with its decree.

6. By the Act of June 9, 1916 (39 Stat. 218) (and amendments thereto) Congress, recognizing the great damage that had been done to the State of Oregon and its counties and the immense monetary loss caused by the unlawful acts of the railroad company as aforesaid directed that title to all unsold "O&C" grant lands, patented or unpatented, be vested, for administration, in the Department of the Interior. By the Act of August 28, 1937 (50 Stat. 874), Congress directed that 75 per cent of the revenues derived from said lands be paid to plaintiff and the other 17 land grant counties. Administrative jurisdiction over all of said lands was retained in the Department of the Interior. The 1916 and 1937 Acts also provide that the moneys derived from said lands shall be deposited in the special account in the Treasury established by the 1916 Act, designated as the "Oregon and California land grant fund", and the 1937 Act further directs the Secretary of the Interior to certify on the first day of July of each year to the United States Treasury and the General Accounting Office the amount of money due each of the 18 Oregon land grant counties, whereupon payment shall be made to the said counties.

By its decree reversing forfeiture of the O & C lands the U. S. Supreme Court necessarily and obviously left intact all rights that any person, company, corporation, county, or state theretofore had in said lands, and this included the $2.50 per acre interest of the railroad company, the rights of the Union Trust Company, of New

York, holder of a mortgage thereon, the right of the State of Oregon to collect delinquent taxes due from 1907 to 1915 (from time first settler suit was brought till end of litigation) during which period the railroad had declined to pay taxes, and, most important of all, said decree of no forfeiture necessarily left intact the sovereign rights of Oregon over all of said O & C lands, for undeniably Oregon had been the "sovereign owner"—the holder of "Title A"—from the time the grant was made until rendition of the Supreme Court's decree reversing forfeiture.

By the terms of the Chamberlain Act of June 9, 1916, all of the aforementioned outstanding monetary obligations against the O & C lands were to be paid off out of income from said O & C lands, deposited as accrued, and principally from the sale of trees on the O & C lands. O & C trees have now fully paid all of said monetary obligations, and "O & C lands, as they stand today, have not cost the United States a penny", to quote from a recent official document of the Department of the Interior.

Hence, the sovereign ownership of Oregon, which hovered over the lands from 1870 to 1915, still abides, as has been righteously recognized by Congress in awarding to Oregon all the usufruct of said lands, less costs of administration. The Interior Department, under the Chamberlain Act, and the McNary Act of 1937 (50 Stat. 874), holds the lands under an actual receivership for the benefit of Oregon, and to now transfer by devious statutory language 472,000 acres of the O & C lands to the Agricultural Department, even with a so-called temporary savings clause (which would not bind a future Congress) would be in derogation of the sovereign rights of Oregon, and would be to change trustees of a Congressionally established express trust, without the consent of the beneficiary.

Such is the gravamen of this plea.

7. By the passage of the Acts of June 9, 1916, and August 28, 1937, the United States Government entered into a compact with the State of Oregon and the eighteen land grant counties thereof that said railroad grant lands should remain permanently as a full source of revenue to the said 18 land grant counties for the benefit of said counties and the State as a whole. Accepting and relying upon the terms of said acts, and in consideration of the payments to be made to them thereunder, the said 18 Oregon land grant counties have developed their industries, schools, and civic enterprises, and have constructed new County roads, and bridges, leading to said lands for the purpose of aiding in the removal of timber therefrom and have maintained at great expense to their taxpayers other public roads over which said timber is transported to market, and have planned and carried out their economic life accordingly, depending upon the continued full payment to them of 75 per cent of the gross revenues derived from said O & C railroad grant lands, by reason whereof the State of Oregon and said land grant counties have been and are possessed of vested and fixed rights in and to said lands and the income derived therefrom in perpetuity, which rights are not subject to withdrawal, diminution, or reduction.

8. By the Act of March 3, 1891 (26 Stat. 1096) the President is authorized by proclamations to establish forest reserves and other public reservations "in any part of the public lands." By proclamations dated June 17, 1892, and September 28, 1893, the President established the Bull Run and Cascade Range Forest Reserves, respectively. 472,000 acres of land in the indemnity strip of the said grant to the Oregon and California Railroad Company came within the exterior boundaries of the said two forest reserves and were, for a time, said to be "con-

troverted"; that is, there was claimed to be a departmental controversy as to whether they were Oregon and California Railroad grant lands or forest reserve lands.

By statute the Department of Agriculture administers forest reserve lands and the Department of the
7 Interior administers O & C lands as heretofore shown.

Through an exchange of interdepartmental memoranda during September, 1942, an agreement was reached between subordinates of the Department of the Interior and the Department of Agriculture that the Forest Service of the Department of Agriculture should make sales of timber from the O. and C. lands in controversy"; namely, the 472,000 acres, the money realized therefrom "to be put in escrow for distribution when the controversy has been resolved", although in a decision rendered in September, 1925, the United States District Court for the District of Oregon, in a suit brought by the Attorney General of the United States as directed in Sec. 10 of the Act of June 9, 1916, held that "These lands lie within the indemnity limits of the grant, and were included within the limits of the national forest reserves by the proclamation of the President. * * * The lands, by reason of the deficiency * * * had previously and necessarily become appropriated to meet the losses sustained to the place grant. They were not at that time a part of the public domain, and were unsusceptible of appropriation by the Government." On April 30, 1954, the United States Court of Appeals for the District of Columbia Circuit, in an action entitled Clackamas County, Oregon, appellant, v. Douglas McKay, Secretary of the Interior, and Ezra Taft Benson, Secretary of Agriculture, appellees, the same being numbered 11,844 in said Court, announced substantially the same ruling as to the status of said so-called controverted lands, and directed distribution of the impounded funds in the said escrow account,

and that the Secretary of Agriculture be enjoined from interfering with the exercise of jurisdiction over said lands by the Secretary of the Interior.

9. Under statutory provisions relating to the national forests the respective counties wherein national
8 forest lands are situated are entitled to receive only 25 per cent of the net revenues derived from said lands, whereas, as hereinbefore shown, the counties are entitled to 75 per cent of the gross revenues derived from Oregon and California grant lands. Furthermore, the Forest Service of the Department of Agriculture pursues the policy of selling timber in large tracts, as to which the smaller, independent local mill-operators are powerless to compete with the large operators who dominate the lumber industry of the northwest, whereas the policy of the Bureau of Land Management of the Department of the Interior is to sell in smaller tracts in which the independent local mills can participate, thus stabilizing the local lumber industry, and other industries, in the several land grant counties, greatly to the benefit of said counties.

10. The Act of June 24, 1954, complained of, provides, sub-section (a) Sec. 1.

"That (a) those unselected and unpatented odd-numbered sections within the indemnity limits of the Oregon & California Railroad land grant authorized by the act of July 25, 1866 (14 Stat. 239), as amended by the act of April 10, 1869 (16 Stat. 47), and for which payment was made by the United States to such railroad or its successors in interest under the act of June 9, 1916 (39 Stat. 218), pursuant to the decree in the case of United States v. Oregon & California R. R. Co. (8 F. (2d) 645), which were included within the boundaries of national forests by proclamations of the President of the United States issued under the dates of June 17, 1892, September 28,

1893, October 5, 1906, January 25, 1907, March 1, 1907, and March 2, 1907, are hereby declared to be revested Oregon & California Railroad grant lands; and said lands shall continue to be administered as national forest lands by the Secretary of Agriculture subject to all laws, rules, and regulations applicable to the national forests: Provided, That all revenues derived from said lands and those revenues heretofore derived from said lands and placed in special deposit by agreement between the Secretary of Agriculture and the Secretary of the Interior shall be disposed of in accordance with the provisions of title II of the act approved August 28, 1937 (50 Stat. 874) as hereby amended, and said lands shall not hereafter be subject to the provisions of any other laws or parts of laws which otherwise prescribe the disposal or distribution of receipts from lands of the United States, except that none of the provisions of this act shall affect revenues heretofore distributed. No part of said lands or the resources thereof shall be subject to exchange under the provisions of this or any other law applicable to national-forest lands or otherwise.

9 11. Plaintiff alleges that sub-section (a) of Sec. 1 of said Act of June 24, 1954, providing for the actual legal transfer from the Department of the Interior to the Department of Agriculture of 472,000 acres said O & C railroad grant lands, is inconsistent with the provisions of the compact or agreement with plaintiff and the other land grant counties of Oregon; is an unconstitutional taking and deprivation of plaintiff's property and property rights, and is repugnant to the provisions of the Constitution of the United States because it deprives the plaintiff of property without just compensation and without due process of law, and hazards the rights of Oregon.

12. Defendants are preparing for and are about to enforce and carry into effect sub-section (a) of Sec. 1 of said Act of June 24, 1954, and unless restrained and en-

joined therefrom will cause irreparable harm and damage to the plaintiff.

13. There are a total of 2,500,000 acres of the O & C lands in Oregon, the 472,000 acres here involved constituting approximately 20 per cent thereof. If the sinuous transfer of the 472,000 acres to the bureau of forestry herein complained of shall be permitted to be carried into execution, it will open the door to future efforts to transfer the remaining approximate 80 per cent of the grant from Interior Department to Agricultural Department, thereby making enforcement of subsection (a) of Sec. 1 of P. L. 426 a major hazard to the sovereign rights of Oregon. A powerful northwest lumber organization has striven for decades to get the O & C lands transferred to the Bureau of Forestry of the Agricultural Department, where it has built up an entente cordiale whereby it receives preferred treatment in the acquisition of logs. Said powerful lumber organization has been active in politics in Oregon, and maintains a public relations organization, and a lobby at Washington, D. C., which has served its ends in the behalf stated. It has striven to convince Oregon that she has no sovereign rights in any of the O & C lands, to the end that it may succeed in getting all of said lands transferred to the bureau of forestry to serve its own purposes. Attention of the Court is respectfully invited to all debates in Congress, reports of congressional committees, and court decisions, bearing hereon, of which the Court may judicially take notice, and especially to the Hearings held May 4, 1954, on S. 2225 (now P. L. 426) and the statement of Senator Anderson, former Secretary of Agriculture, appearing at the bottom of page 12 and top of page 13 that his study as Secretary "certainly indicated that the land now belongs without question to Oregon as far as benefits from it go and should be used for the benefit of the people of Oregon". And to the statement of Leslie M. Scott, on

page 12: "It would appear that the land was originally set aside as a gift to the people of Oregon in their struggling statehood". And the statement of Robert B. Jones on page 34 relative to past committees of Congress that settlement of the status of the controverted lands be by court decision rather than by legislation, and to the bulk of documented material submitted by Commissioner Jones and printed in the Hearings. That the decision of this Court in the present suit will be a test as to the future fate of all of O & C, is demonstrated by the fact that in the 82d Congress S. 1149 was offered to transfer all the O & C lands to the Agricultural Department, the Hearings thereon constituting a book of 500 pages before the McClellan Committee. Sec. 7 of S. 1149 was amended to include a "savings clause" to the effect that notwithstanding transfer the O & C counties should continue to receive their 75 per cent of income, but a Report to the McClellan Committee by its staff stated that this "savings clause" was inserted in a revision of S. 1149 to remove objections of O & C counties, "but that the
11 savings clause would not bind future Congresses".

Those printed Hearings also show that Secretary of Interior Oscar L. Chapman strongly opposed S. 1149, saying that instead of being a bill to reorganize the Agricultural Department it was a bill to disorganize the Interior Department". On induction of President Eisenhower, January 1953, Congress, first off, was asked to pass and did pass a bill authorizing the President, if he so desired, to transfer O & C lands from Interior Department to Agricultural Department by the stroke of a pen, under the "Reorganization Act of 1949", as so extended for 2 years. The President thereupon appointed a commission, consisting of Dr. Arthur Sherwood Flemming (who had been lead-off witness for 'transfer' by S. 1149), Milton Eisenhower, and Nelson Rockefeller, to explore "overlapping situations" and make recommendation to the President.

The Flemming commission, according to The Portland Oregonian, did recommend to the President in April, 1953, that the President transfer O & C lands to bureau of forestry by "Executive Order", but that on objection by Secretary of Interior McKay to that method of procedure the plan was not carried out. That plaintiff is informed and verily believes, and therefore charges the fact to be, that the largest lumber monopoly in the world, headquartered at Tacoma, Washington, through its lawyers and lobbyists at Washington, has been the guiding spirit beihnd S. 1149, and all the other moves herein referred to, with the design to defeat the people of Oregon of their sovereign rights in the O & C lands, by getting them transferred to the bureau of forestry, Agricultural Department, where the said lumber monopoly hopes soon to get them all transferred with the objective herein stated. Plaintiff, at the trial of this suit, will endeavor to prove, by admissable documentary evidence, including that herein mentioned, that this Complaint of Clackamas County has absolute verity, and that this cause is of major importance, not only to Oregon, but to the entire United States.

WHEREFORE, plaintiff prays:

1. That the defendants, their assistants, agents, attorneys, servants, and employees be restrained and enjoined, pendente lite and permanently, from enforcing sub-section (a) of Sec. 1 of said Act of June 24, 1954, relating to the actual transfer of said so-called controverted 472,000 acres of O & C lands to the Department of Agriculture, because said provisions are repugnant to the Constitution of the United States.

2. That the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit be requested by this Court to designate two judges to participate with a judge of this Court in hearing and determin-

ing the constitutionality of said sub-section (a) of the Act of June 24, 1954, pursuant to the provisions of Title 28 United States Code, Sec. 2284.

3. That upon final hearing the said provisions of subsection (a) of Sec. 1 of the Act of June 24, 1954, be declared to be contrary to and violative of the provisions of the Constitution of the United States, and, therefore, of no force or validity whatsoever.

4. That plaintiff be granted such other, further and different relief as to the Court may be deemed just and proper or the nature of the case may require.

CLACKAMAS COUNTY, OREGON

By Robert B. Jones (Sgd)
Robert B. Jones,
County Commissioner
Stanley S. Skoko (Sgd)
Stanley S. Skoko,
County Commissioner

(Sgd) A. W. Lafferty
A. W. Lafferty,
Fenton Bldg.,
Portland 4, Oregon
Special Counsel

13 (Sgd) Richard L. Merrick
Richard L. Merrick
1624 Eye St., N.W.,
Washington 6, D. C.,
Attorney for Plaintiff.

STATE OF OREGON,
COUNTY OF CLACKAMAS ss

Robert B. Jones being first duly sworn according to law on oath deposes and says that he is one of the County Commissioners of Clackamas County, Oregon, plaintiff in this action; that he has read the foregoing complaint exe-

cuted by said Clackamas County, and knows the contents thereof, and that he verily believes the same to be true.

(Sgd.) Robert B. Jones.

Subscribed and sworn to before me this 14th day of September, 1954.

(Seal) (Sgd.) M. G. McLean
Notary Public in and for the County of Clackamas, State of Oregon.

My Commission Expires Feb. 24, 1956.

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14 Filed October 12, 1954

Motion to Dismiss the Complaint and Motion to Strike Portions of Complaint

The defendants, Douglas McKay, Secretary of the Interior, and Ezra Taft Benson, Secretary of Agriculture, by Perry W. Morton, Assistant Attorney General, and Thomas L. McKevitt, Attorney, Department of Justice, move the Court as follows:

1. To dismiss the complaint because it fails to state a claim upon which relief can be granted.

2. To strike, as immaterial, impertinent and scandalous, all of paragraph 13 except the first two sentences.

Respectfully submitted,

/s/ Perry W. Morton
Perry W. Morton
Assistant Attorney General

/s/ Thos. L. McKevitt
/s/ Thos. L. McKevitt
Attorney,
Department of Justice
Washington, D. C.

• • • •

15 Filed Dec. 1, 1954

Motion for Injunction and Application for Appointment of Three Judge Statutory Court

Clackamas County, Oregon, the above named plaintiff, by counsel, moves the Court as follows:

1. For an injunction pendente lite and permanently restraining and enjoining the defendants, Douglas McKay, Secretary of the Interior, and Ezra Taft Benson, Secretary of Agriculture, and their and each of their assistants, agents, attorneys, servants and employees, from enforcing and carrying out or attempting to enforce and carry out the provisions of Subsection (a) of Section 1 of the Act of Congress approved June 24, 1954 (Public Law No. 426, 83rd Congress, 68 Stat. 270), relating to 472,000 acres of land in the State of Oregon, on the ground and for the reason that said portion of said Act of Congress is repugnant to the Constitution of the United States, as shown by the verified complaint herein.

2. That an application be made by this Court to the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit to designate two other judges to participate in hearing and determining
16 the foregoing motion for injunction, under and in accordance with the Act of June 25, 1948 (62 Stat. 968; 28 U.S.C. 2284).

/s/ Richard L. Merrick,
Richard L. Merrick,
1624 Eye St., N. W.
Washington 6, D. C.

/s/ A. W. Lafferty
A. W. Lafferty
Fenton Bldg.,
Portland 4, Oregon,

/s/ Byron N. Scott,
Byron N. Scott,
Wyatt Building,
Washington 5, D. C.,
Attorneys for Plaintiff.

• • • •

17 Filed Dec. 2, 1954

Order

This case having come on for hearing on plaintiff's application for the convening of a three-judge court pursuant to the provisions of 28 U.S.C. 2284 and the court, having concluded that no substantial constitutional question is raised in the complaint;

IT IS HEREBY ORDERED that the plaintiff's application for the convening of a three-judge court be and hereby is denied.

Dated this 2nd day of December, 1954.

/s/ Alexander Holtzoff
District Judge

/s/ Richard L. Merrick
Attorney for Plaintiff

Presented by:

/s/ Thos. L. McKevitt
Thos. L. McKevitt
Attorney for Defendants

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18 Filed Dec. 2, 1954

Order Dismissing Complaint

This action came on for hearing upon the motion of defendants to dismiss the complaint, and was duly heard.

Thereupon, upon consideration thereof, it is, by the Court, this 2d day of December, 1954:

ORDERED, That the said motion of defendants be and the same is hereby granted and the complaint herein is dismissed.

/s/ Alexander Holtzoff
Judge

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12533

CLACKAMAS COUNTY, OREGON, APPELLANT

v.

DOUGLAS MCKAY, Secretary of the Interior, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided July 28, 1955

Mr. L. Eugene Crampton, of the bar of the Supreme Corut of Oregon, *pro hac vice,* by special leave of Court, with whom *Messrs. A. W. Lafferty, Richard L. Merrick* and *Byron N. Scott* were on the brief, for appellant.

Mr. Harold S. Harrison, Attorney, Department of Justice, with whom *Mr. Roger P. Marquis,* Attorney, Department of Justice, was on the brief, for appellees. *Mr. Leo A. Rover,* United States Attorney, and *Mr. Lewis Carroll,* Assistant United States Attorney, also entered appearances for appellees.

Before EDGERTON, Chief Judge, and PRETTYMAN and WILBUR K. MILLER, Circuit Judges.

PRETTYMAN, *Circuit Judge:* This case is a sequel to one decided by this court in 1954.[1] It is unnecessary to

[1] Clackamas County, Ore. v. McKay, — U.S. App. D.C. —, 219 F.2d 479, *judgment vacated as moot,* 349 U.S. 909 (1955).

repeat the long and involved background to the litigation. Our decision was promulgated April 30, 1954. Subsequently, on June 24, 1954, the President approved an Act of Congress dealing with the subject matter. That Act[2] declared that (1) all the unselected and unpatented odd-numbered sections within the indemnity grants of the Oregon and California Railroad, and included within the boundaries of national forests, are revested railroad grant lands; (2) such lands shall be administered by the Secretary of Agriculture; and (3) all revenues derived from the lands shall be disposed of according to the Act of August 28, 1937.[3] The new statute was in no way inconsistent with the decision of the court but settled an interdepartmental dispute as to administrative authority over the lands, a question we did not attempt to determine.[4]

Clackamas County strenuously objects to the transfer of the lands from the Department of the Interior to the Department of Agriculture. It claims a vested right, derived from what it says were the retained sovereign rights of Oregon at the time of its admission into the Union as a State. It reasons that before admission Oregon was sovereign over all the lands within its borders; that when the United States granted the lands to the railroad they were thereby returned to the sovereign overrule of the State of Oregon; and that when the Supreme Court declared against the forfeiture[5] it solidified that sovereign authority. It says the Department of the Interior holds the lands in trust or in receivership for

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[2] 68 STAT. 270, 43 U.S.C.A. §§ 1181g-1181j.

[3] 50 STAT. 874.

[4] *Supra* note 1, 219 F.2d at 498 (On Petition for Rehearing).

[5] Oregon & C. R. R. v. United States, 238 U.S. 393, 59 L.Ed. 1360, 35 S.Ct. 908 (1915).

Oregon. It says the 1916[6] and 1937[7] Acts of Congress were "compacts" with Oregon, upon which that State relied in her plans for development. It says the transfer of lands to the Department of Agriculture threatens a reduction in income to it from the lands. It says, therefore, the Act of 1954 is a taking without compensation or due process.

The basic difficulty with the argument is that it confuses sovereign authority over lands within the borders of a sovereignty with the ownership of such lands. Our problem deals with ownership. These lands are clearly property of the United States. At all times since the admission of Oregon to the Union they have been either property of the United States or property of the railroad. The interest of Oregon was in the attraction of settlers to the lands and the placement of the lands on the tax rolls. When the lands revested in the United States[8] Congress provided for the payments from the revenues as a means of meeting the tremendous disappointment and loss suffered by Oregon, but the provision was by way of meeting a moral or ethical obligation rather than a legal one.

When the United States acquires, by eminent domain or otherwise, a tract of land in a State, it becomes the owner, and thereafter disposition is within the unfettered discretion of the Congress. No overriding sovereign governmental authority of the State impinges upon that discretion or gives rise to power on the part of courts to interfere with that disposition. Such is the case at bar.

In ultimate analysis the County complains of a threat

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[6] Act of June 9, 1916, 39 STAT. 218.

[7] *Supra* note 3.

[8] Act of June 9, 1916, as amended by Act of Aug. 28, 1937, both *supra*.

of damage which it fears, rather than an actual injury. But in any event the public domain in Oregon passed to the United States when Oregon was admitted. Such a provision was implicit in the Act of admission.[9] The 1916 and 1937 Acts of the Congress were in no sense compacts but were statutes relating to disposition of federal public property. No taking is involved in the 1954 Act. And of course the courts cannot interfere with the administration of public property as arranged by the Congress and the Executive, so long as constitutional boundaries are not transgressed by either branch or statutory ones by the latter.

The judgment of the District Court dismissing the complaint is

Affirmed.

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[9] Act of Feb. 14, 1859, 11 STAT. 383, 384, especially the clauses reciting grants of land to the State and the clause "that said State shall never interfere with the primary disposal of the soil within the same by the United States," the latter in light of Gibson v. Chouteau, 13 Wall. (80 U.S.) 92, 99, 20 L.Ed. 534 (1871).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

Office - Supreme Court, U.S.
FILED
NOV 8 1955
HAROLD B. WILLEY, Clerk

No. 493

CLACKAMAS COUNTY, OREGON

v.

DOUGLAS McKAY, SECRETARY OF INTERIOR and EZRA TAFT BENSON, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM SUGGESTING THAT THE PETITION FOR A WRIT OF CERTIORARI WAS NOT FILED IN TIME

The judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled case was entered on July 28, 1955. A petition for writ of certiorari was filed on October 27, 1955, more than 90 days after the date of judgment. There has been no request for an extension of time in which to file the petition. It appears, therefore, that the petitioner's application for a writ of certiorari is out of time and should be denied.

SIMON E. SOBELOFF
SOLICITOR GENERAL

NOVEMBER, 1955.